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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Homedics, Inc.  
v.  
Pollenex Corporation

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Opposition No. 89,271  
to application Serial No. 74/252,116  
filed on March 4, 1992

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Julie Greenberg of Gifford, Krass, Groh, Sprinkle, Patmore,  
Anderson & Citkowski, P.C. for Homedics, Inc.

Charles A. Laff, Martin L. Stern, and Diana Flynn of Laff,  
Whitesel, Conte & Saret, Ltd. for Pollenex Corporation.

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Before Cissel, Quinn and Hairston, Administrative Trademark  
Judges.

Opinion by Hairston, Administrative Trademark Judge:

**Opposition No. 89,271**

Pollenex Corporation has filed an application to register the mark BODY BASICS for "hand held electrical massage apparatus."<sup>1</sup>

Registration has been opposed by Homedics, Inc. Opposer alleges that applicant's mark, when applied to its goods, so resembles the term BODY BASICS, which has been previously and continuously used by opposer since November 1988 in connection with the marketing and promotion of a line of health care appliances, including massagers for home use, as to be likely to cause confusion, mistake or deception. Opposer has also pleaded ownership of application Serial No. 74/312,421, filed on September 10, 1992, to register the mark BODY BASICS for "hand held electrical massage apparatus" and claiming dates of first use of July 24, 1992.

Applicant, in its answer, has denied the salient allegations of the notice of opposition. Applicant has also asserted, as "affirmative defenses," that opposer has failed to state a claim upon which relief can be granted because opposer did not use the term BODY BASICS in a trademark, service mark or trade name sense prior to the filing date of applicant's application, and that opposer is guilty of acquiescence and laches and is estopped from asserting any

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<sup>1</sup>Serial No. 74/252,116, filed March 4, 1992, which alleges a bona fide intention to use the mark in commerce.

rights against applicant with regard to applicant's application to register the mark BODY BASICS.<sup>2</sup>

The record consists of the pleadings; the file of the involved application; and trial testimony, with exhibits, of opposer's witnesses, Roman Sam Ferber, Michael Perkins and Jack Disalvo. Applicant took no testimony, but submitted, under a notice of reliance, the discovery deposition of Mr. Ferber<sup>3</sup> and opposer's responses to applicant's discovery requests. Both parties filed briefs on the case and were represented by counsel at the oral hearing.

The issues to be decided in this case are priority of use and likelihood of confusion.

Opposer, Homedics Inc., is in the business of designing, producing and marketing a variety of health and fitness products. According to opposer's president, Mr. Ferber, opposer began doing business around 1987-88 and its first products were an adjustable back cushion and inflatable neck pillow. Opposer expanded its line of

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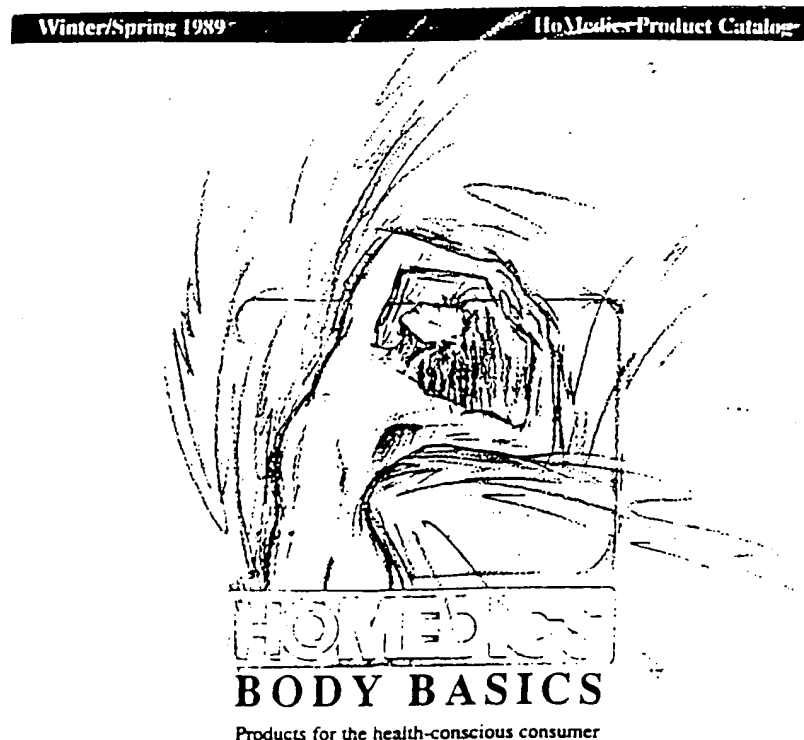
<sup>2</sup>In its brief, applicant never discussed the defenses of acquiescence and laches. In any event, these defenses are unavailable to applicant. *NCTA v. American Cinema Editors*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991).

<sup>3</sup>We note that applicant submitted a copy of the discovery deposition, only. Applicant did not submit the exhibits, one of which was a copy of opposer's 1991 dealer price list. Exhibits to a discovery deposition do not automatically come in with the deposition when the latter is submitted under a notice of reliance. To form part of the record, the exhibits must be submitted as well. In view thereof, and since opposer's 1991 price list otherwise has not been properly made of record (see the Board's January 3, 1996 order), we have not considered this list in reaching our decision herein.

products to include hand held massagers for home use, seat cushions, air purifiers, and heart monitors. Opposer's catalogs constitute the primary marketing tools for sales of these products, with distribution of its 1989 catalog in the range of 10,000 to 15,000 and that of its 1990-91 catalog in the range of 15,000 to 20,000.

According to Mr. Ferber, approximately a year after opposer began business, he and an employee of the firm of Lutz & Associates came up with the term BODY BASICS to identify opposer's line of health and fitness products. BODY BASICS appears on the front cover of opposer's 1989 and 1990-91 catalog in the following manners:

**1989 HOMEDICS CATALOG**



1990-91 HOMEDICS CATALOG



BODY BASICS appears in the text on page 2 of opposer's 1989 catalog as follows:



Dear Customer:

We're in the body business—so you might say everyone can relate to our products. But there's a dynamic new market out there. One that works hard . . . and expects comfort when the work is done. Comfort that comes from the basics . . . the body basics.

HoMedics reaches that market with its line of dynamic body basics.

Get into the body business with HoMedics. We're working hard to reach your hard-working consumers!

A handwritten signature in dark ink, appearing to read "Ron Ferber".

Ron Ferber  
President

A handwritten note in dark ink that reads: "It's still more maintenance. That's what it is. It must your needs!"

29245 Stephenson Hwy • Madison Heights, MI 48071 • (313) 548-9500 • FAX (313) 548-2382  
TOLL-FREE 1-800-333-8282

Opposer's 1989 and 1990-1991 catalogs were distributed to wholesalers and retailers, ranging from small drugstores to large department store chains, and to health professionals, including chiropractors. While Mr. Ferber indicated that BODY BASICS appeared on other promotional materials, no additional materials were offered into evidence. According to Mr. Ferber, opposer spent approximately \$250,000 in promotional and advertising expenses for its health and fitness products for the period 1988-92. During the same period, opposer's sales totaled approximately \$100,000. In mid-1992 opposer began applying BODY BASICS to boxes containing its products. According to Mr. Ferber, for the period July 1992 to July 1994, opposer sold approximately 3.1 million units of merchandise bearing the mark BODY BASICS.

The record contains no information about applicant, although it appears that applicant has begun use of its mark.

Turning first to the issue of priority, opposer maintains that since prior to March 4, 1992, the filing date of applicant's application, it has been using the term BODY BASICS in connection with health and fitness products, including massagers for home use, in a manner analogous to trademark use, and that this use of BODY BASICS is sufficient to give opposer priority rights in the term and

to bar registration of applicant's mark under Section 2(d) of the Trademark Act.

Applicant, however, contends that opposer's use of the term BODY BASICS was not in a manner analogous to trademark use; but rather in a descriptive manner, i.e., to describe a class of products which provides the user with body comfort and relaxation, and that opposer may not rely on this use of the term BODY BASICS to establish priority. Further, applicant contends that opposer's evidence of analogous use is insufficient because opposer has not shown that its catalogs bearing the designation BODY BASICS reached more than a negligible number of customers.

In *T.A.B. Systems v. PacTel Teletrac*, 77 Fed.3d 1272, 37 USPQ2d 1879, 1882 (Fed. Cir. 1996), the Court of Appeals for the Federal Circuit noted that:

It is well settled that one may ground one's opposition to an application on the prior use of a term in a manner analogous to service mark or trademark use. Such an "analogous use" opposition can succeed, however, only where the analogous use is of such a nature and extent as to create public identification of the target term with the opposer's product or service.

The cases on analogous use have not required that opposer proffer survey evidence or other direct evidence of the consuming public's identification of the target word or phrase with the opposer as the source of a given product or service. Instead, the fact finder may infer the fact of identification on the basis of indirect evidence regarding the opposer's use of the word or phrase in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications.



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(Citations omitted.)

Further, the Court noted that the "activities claimed to constitute analogous use must have substantial impact on the purchasing public". 37 USPQ2d at 1882.

After careful consideration of the parties' arguments and evidence herein, we find that opposer has established its priority with regard to the term BODY BASICS in connection with its line of health and fitness products, including massagers for home use.

In support of its position that opposer has used BODY BASICS in a descriptive, rather than a trademark manner, applicant relies on portions of the discovery and testimony depositions of opposer's president, Mr. Ferber. It is essentially applicant's position that Mr. Ferber has conceded in these portions of the depositions that BODY BASICS is descriptive of opposer's products. The pertinent portions of the depositions are set forth below:

- Q. Were you using the mark -- not the mark, the words Body Basics as descriptive terms to try to explain to readers what your product line was?
- A. That may have been one reason.
- Q. I believe, again, later in Paragraph 2 [on the first page of opposer's 1989 catalog], you also used the words Body Basics. What were you intending to communicate at that point in the letter...?
- A. I can't say what I was intending at that time. Again, I can only tell you maybe based on my opinion now, I probably was trying to further an understanding of that terminology in making it, relating it to the front cover of the catalogue. (Ferber discovery deposition, p. 43)

.....

- Q. The Body Basics terminology, which I understand you use in conjunction with the entire line of goods, does it... describe a particular product in here [the line of goods]? Is there a particular product...
- A. No.
- Q. -- that you think is identified?
- A. No.
- Q. Does it describe a particular use of any of your products or all of your products?
- A. No. I mean the name is, it's supposed to be a catchall for everything I have in my line. Everything included.
- Q. Does it describe a particular feature of any of these products?
- A. No. If I did, I mean -- if it did, people would be ordering Body Basics from me. People order items from me. I never got an order that somebody said, "I want to order a Body Basics." It's not specific to any one item. It's basically a catchall phrase that describes everything that I sell. (Ferber testimony deposition, p. 19)

We disagree with applicant that the above testimony is a concession that BODY BASICS is descriptive of opposer's products. There is nothing in this testimony that indicates that BODY BASICS conveys an immediate idea of the ingredients, qualities or characteristics of opposer's products.

Further, applicant likens this case to *In re Manco, Inc.*, 24 USPQ2d 1062 (TTAB 1992) [THINK GREEN for mailing and shipping boxes does not function as an indication of source, but rather as an expression of environmental awareness]; and *IpcO Corp. v. Blessings Corp.*, 5 USPQ2d 1974 (TTAB 1988) [Use of CONFIDENCE in phrase "confidence to enjoy a normal and active life" in booklet describing

incontinence products does not constitute use in manner analogous to trademark use]. Each of these cases, however, is distinguishable. *In re Manco, Inc.* is distinguishable because applicant has not shown that BODY BASICS is a recognized expression in the health and fitness field. *Ipcor Corp. v. Blessings Corp.* is distinguishable because in this case, opposer has not simply used BODY BASICS in a phrase or text. Rather, BODY BASICS appears prominently on the cover of two editions of opposer's catalogs for its line of health and fitness products.

We turn next to applicant's argument that the evidence herein does not permit the inference that opposer reached more than a negligible number of potential customers with its references to BODY BASICS and thus opposer has not established that it used BODY BASICS in a manner analogous to trade mark use. Opposer relies on *T.A.B. Systems, supra*, where the opposer therein, PacTel, sought to rely on prior use of the term TELETRAC for vehicle tracking and location services in a manner analogous to service mark use. The Court found that PacTel's evidence failed to support the inference that PacTel reached more than a negligible share of potential customers with its references to TELETRAC. In reaching this finding, the Court noted, *inter alia*, that it was unable to determine that more than a negligible number of potential customers was reached by PacTel's advertising and promotional efforts in the absence of proof by PacTel of the size of its market, i.e., the number of potential

customers for its vehicle tracking and location service. The court noted, however, that prior analogous use does not require proof that "a fixed percentage, like 20%, much less 51%, of the potential customers must have formed the required 'prior public identification.'" 37 USPQ2d at 1883.

In this case, the record shows that the relevant purchasing public for opposer's products is not only ordinary consumers, but the trade as well, i.e., wholesalers, retailers and health professionals. Indeed, opposer's "immediate" purchasers are those in the trade as this is who opposer sells its products to. The uncontroverted evidence is that opposer distributed to the trade a minimum of 25,000 catalogs bearing the term BODY BASICS from 1989 to 1991. Featured in these catalogs were, inter alia, body massagers, foot massagers, shower massagers, seat cushions, back cushions, air purifiers, and heart monitors. Opposer promoted its products primarily through catalogs and the bulk of its \$250,000 advertising and promotional expenditures was for printing and distributing catalogs. Notwithstanding the absence of proof of the number of potential purchasers of opposer's products, and even assuming that they number in the millions, since the ultimate purchasers of the products are ordinary consumers, we believe that opposer's evidence supports the inference that more than a negligible number of opposer's potential customers were reached. Stated differently, opposer's distribution to the trade of this number of

catalogs prominently bearing the term BODY BASICS over an extended period of time establishes prior use of the term in a manner analogous to a trademark.<sup>4</sup> We are not troubled by the fact that opposer offered no other materials (e.g., advertising brochures or articles in trade publications) as evidence of its promotional efforts. We note that use of a term in one kind of promotional material has been held to create protectible rights in the term. See *Sargent & Greenleaf, Inc. v. Ideal Security Hardware Corporation*, 186 USPQ 94 (TTAB 1975) [Advertisements in trade publications for locks featuring the term THE BRUTE sufficient to vest in opposer protectible rights therein].

Turning then to the issue of likelihood of confusion, applicant's only argument with respect thereto is that opposer has shown no instances of actual confusion during its period of analogous use. However, applicant offered no evidence bearing on the extent of use of its mark such that we can conclude that there was any real opportunity for actual confusion to occur. In any event, it must be remembered that evidence of actual confusion is hard to come by and that the test under Section 2(d) of the Act is not actual confusion but likelihood of confusion.

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<sup>4</sup>In reaching this conclusion, we accorded no weight to the testimony of Richard Perkins, a buyer for Arbor Drugs. Although Mr. Perkins testified that he associates the term BODY BASICS with opposer, it was unclear whether this association began during the period of analogous use or after this period when BODY BASICS was used in a trademark manner.

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We find that purchasers familiar with opposer's use of the term BODY BASICS in connection with health and fitness products, including massagers for home use, would be likely to believe, upon encountering applicant's hand held massagers, that the respective products originated with the same entity.

Decision: The opposition is sustained.

R. F. Cissel

T. J. Quinn

P. T. Hairston  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board